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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MEHRDAD OKHOVAT, Plaintiff and Respondent, v. MORAD B. NEMAN, Defendant and Appellant.	B256930 (Los Angeles County Super. Ct. No. SC114318)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed with modifications.

Knickerbocker Law Firm and Richard L. Knickerbocker for Defendant and Appellant.

Nehoray Legal Group and Mac E. Nehoray for Plaintiff and Respondent.

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After his counsel was relieved, defendant and appellant Morad B. Neman hired Attorney Philip Metson to represent him. Metson "completely forgot" that he had agreed to represent Neman in this matter and did not calendar the trial or appear at trial. Neman also did not appear at trial. Following a short trial, the trial court entered judgment against Neman. Neman moved for a new trial and moved to set aside the judgment under Code of Civil Procedure section 473, subdivision (b) (section 473(b)).[1]

Except for reducing the amount of the judgment, the court denied Neman's requested relief, and he now appeals. We conclude that Neman demonstrated his cross-complaint should have been dismissed without prejudice rather than with prejudice and modify the judgment accordingly. The remainder of Neman's contentions lack merit, and we affirm the judgment as modified and affirm the order denying Neman's motion to set aside the judgment.

FACTS AND PROCEDURE

Mehrad Okhovat sued Neman alleging causes of action for assault and battery as well as intentional and negligent infliction of emotional distress. The basis for the complaint was that Neman attacked Okhovat on October 15, 2010, causing him to suffer injuries. Neman answered the complaint. On July 2, 2012, Neman filed a cross-complaint.

On July 18, 2013, Neman's counsel Bert Rogal filed an ex parte application to continue trial, which was scheduled for September 3, 2013, and concurrently filed a motion to be relieved as counsel. On August 12, 2013, the trial court granted Rogal's motion to withdraw as counsel and continued the trial. It is undisputed that Neman had notice of the trial date. It also is undisputed that Attorney Metson did not file a substitution of attorney and did not notify the court or opposing counsel that he would be representing Neman.

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[1] Undesignated statutory citations are to the Code of Civil Procedure.

On October 7, 2013, when the case was called for trial, neither Neman nor Metson appeared. The court heard evidence and awarded Okhovat judgment in the amount of $244,210. The trial court dismissed the cross-complaint with prejudice for failure to proceed at trial. Judgment "after court trial" was entered October 28, 2013.

On October 25, 2013, Neman moved to set aside the judgment. That motion was withdrawn.

On November 7, 2013, Neman, now represented by John Wilson, moved for a new trial. Neman argued that there was extrinsic fraud because he was not allowed to present his case. He also argued that the court erred in awarding $120,000 for lost income. Attorney Metson's declaration accompanied the motion. Metson declared that he had agreed to act as counsel for Neman in the current case. He did not have a retainer agreement and did not prepare a substitution of counsel. He was busy with other matters and "completely forgot that [he] had agreed to represent Mr. Neman in this matter . . . ." He did not calendar the October 7, 2013 date. His mother was rushed to the hospital after falling on October 7, 2013. He did not remember that he had trial in this matter on that day. He did not communicate to the court that his mother was in the hospital.

Neman's declaration also was attached to his motion for a new trial. Neman averred that Metson agreed to represent him. He and Metson planned that "Metson would appear on October 7, 2013, the date set for trial, and seek a continuance because he was just becoming counsel, but if the Court denied our request, I anticipated that Mr. Metson would have called me, and I would have appeared. I live within 15 minutes of the courthouse." Neman further declared: "I understand that I was given notice of the trial by mail, but since I was being represented by Mr. Metson, I left the matter to him."

In response to Neman's motion for new trial, Okhovat conceded that the judgment should be reduced by $120,000. At the hearing, Neman argued that damages should have been limited to the amount paid by the insurer, but the court would not allow Neman to retry the case. Okhovat's counsel represented that Okhovat testified

he had not received any payment from the insurance companies. The court reduced the award by $120,000 and otherwise denied Neman's motion for new trial. A modified judgment was filed February 14, 2014. The judgment indicated it was a judgment after court trial. Judgment stated that defendant was notified of trial but did not appear. The court awarded Okhavat $124,210.

On March 26, 2014, Neman filed a motion to set aside the judgment.[2] He argued that it should be set aside pursuant to the mandatory and discretionary provisions of section 473(b). He further argued that there was excusable neglect because Metson forgot about the trial because of the "press of business" and his mother's medical emergency. He attached the same declarations as attached to his motion for new trial.

The court denied the motion. Neman appealed from the February 14, 2014 amended judgment and the order denying his motion to set aside the judgment.

DISCUSSION

The principal issues on appeal concern the application of section 473(b), which provides in pertinent part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. . . . Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting *default* entered by the clerk against his or her client, and which will result in entry of a *default judgment*, or (2) resulting *default judgment* or *dismissal* entered against his or her client, unless the court finds that the *default or dismissal* was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (Italics

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[2] We grant Neman's request to augment the record to include his motion to set aside the judgment.

added.) The first quoted sentence governs discretionary relief and the other governs mandatory relief.

1. No Basis for Mandatory Relief

Neman argues that mandatory relief was warranted because the judgment in this case was the procedural equivalent of a default judgment.

While some old authority supports Neman's position, more recent authority uniformly rejects it. *Avila v. Chua* (1997) 57 Cal.App.4th 860, *Yeap v. Leake* (1997) 60 Cal.App.4th 591 (*Yeap*), and *In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438 support Neman's argument. For example, in *Yeap*, the plaintiff's attorney did not appear to represent the plaintiff at a scheduled arbitration for which the attorney had notice. (*Yeap*, at p. 595.) Plaintiff's attorney later failed to timely request a trial de novo. (*Ibid.*) The majority concluded that the failure to appear at the arbitration was similar to a default, and further concluded that relief under the mandatory provision was warranted. (*Ibid*.) The majority reasoned that the plaintiff never had an opportunity to litigate the merits of her claim. (*Id*. at p. 601.) "Thus, the judgment entered in this matter was analogous to a default because it came about as a result of appellant's failure to appear and litigate at the arbitration hearing." (*Ibid*.)

Acting Presiding Justice Epstein dissented. (*Yeap, supra*, 60 Cal.App.4th at pp. 602-605.) He concluded that the mandatory provision did not apply because there was no default or dismissal as required by the mandatory portion of the statute. (*Id*. at pp. 603-604.) "If the Legislature had intended to require relief whenever a client loses his or her day in court due to attorney error, it could easily have said so. The Legislature has balanced the competing interests so that, where a party is out of court for failure to file a charging or responsive pleading due entirely to the fault of counsel, relief is mandatory; otherwise it is discretionary." (*Id*. at p. 604.)

The same division that decided *Yeap* more recently held that cases interpreting "the mandatory provision" according to its terms are more persuasive than those attempting to extend the mandatory provision beyond default judgments and dismissals. (*Hossain v. Hossain* (2007) 157 Cal.App.4th 454, 457-458.) Other courts

similarly have limited the mandatory provision to defaults and dismissals based on the statutory language. (*Noceti v. Whorton* (2014) 224 Cal.App.4th 1062, 1064 [no mandatory relief for failing to appear at trial]; *Las Vegas Land & Development Co., LLC v. Wilkie Way, LLC* (2013) 219 Cal.App.4th 1086, 1091 [summary judgment not equivalent to default]; *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 228 [summary judgment not equivalent to default]; *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1417 [mandatory relief does not apply to summary judgment]; *Vandermoon v. Sanwong* (2006) 142 Cal.App.4th 315, 321 [judgment after uncontested trial not default judgment]; *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 133 (*English*) [mandatory provision does not apply to summary judgment].) Those cases have held that a "'default' means only a defendant's failure to answer a complaint, and a 'default judgment' means only a judgment entered after the defendant has failed to answer and the defendant's default has been entered." (*Vandermoon v. Sanwong, supra*, at p. 321.)

In *English, supra*, 94 Cal.App.4th 130, which we find persuasive, the court extensively examined the language and history of section 473(b) and concluded it applied only to default judgments and dismissals. (*English*, at p. 133.) "As originally enacted, the mandatory provision of section 473(b) was much more limited in scope than the discretionary provision of the statute. While the discretionary provision at that time allowed the court to grant relief from 'a judgment, order, or other proceeding . . . ,' the mandatory provision required the court to grant relief only from a 'default judgment.'" (*Id*. at p. 138.) "The Legislature's focus on providing mandatory relief from default judgments, but not from other types of judgments, apparently stemmed from reluctance by the trial courts to grant discretionary relief from default judgments because of increased caseloads." (*Id*. at p. 139.) "The mandatory provision of the statute requires the court to vacate not any 'default,' but only a 'default entered by the clerk . . . which will result in entry of a default judgment . . . .'" (*Id*. at p. 143.) The language of the statute makes clear that default refers only to a defendant's failure to answer, not to every failure of an attorney. (*Ibid*.) "A 'default judgment' within the

meaning of section 473(b) is a judgment entered after the defendant has failed to answer the complaint and the defendant's default has been entered." (*Ibid*.)

Applying this reasoning here, the judgment rendered after trial was not a default judgment. The court did not strike Neman's answer. Okhovat testified and presented documentary evidence. The trial court properly denied Neman's request for mandatory relief.

2. No Basis for Discretionary Relief

In contrast to the mandatory provision, the discretionary provision does not apply only to defaults, default judgments, and dismissals. It applies to any judgment. (*Zamora v. Clayborn Contracting Group, Inc*. (2002) 28 Cal.4th 249, 254.)

Neman argues that the trial court should have granted discretionary relief and vacated the judgment. Neman further argues that the judgment resulted from his attorney's excusable neglect. According to him, "any reasonably prudent person could have made the same mistakes he/they did under similar circumstances."

We recently explained the principles governing discretionary relief under section 473(b). "The test for discretionary relief under Code of Civil Procedure section 473 requires the party seeking relief to show excusable error. '"A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief." [Citation.] In determining whether the attorney's mistake or inadvertence was excusable, "the court inquires whether 'a reasonably prudent *person* under the same or similar circumstances' might have made the same error.["] [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error "fairly imputable to the client, i.e., mistakes anyone could have made." [Citation] "Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney

malpractice.””” (*Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1132.)

Here, Metson’s forgetting that he “had agreed to represent Mr. Neman in this matter” is not excusable neglect. Several cases support this conclusion (and Neman identifies no case supporting the claim that forgetting about a representation is excusable). The press of business does not constitute excusable neglect. (*Huh v. Wang*, *supra*, 158 Cal.App.4th at p. 1424.) Being overwhelmed and believing a summary judgment had been filed and failing to calendar the date for the opposition or hearing was not excusable neglect. (*Ibid*.) The failure to timely file a claim is not excusable neglect. (*Torbitt v. State of California* (1984) 161 Cal.App.3d 860, 867.) The trial court did not abuse its discretion in concluding that failing to appear at a court-ordered arbitration and failing to timely move for a new trial is not excusable neglect. (*Yeap*, *supra*, 60 Cal.App.4th at p. 599, fn. 7.)

Similarly here, counsel’s errors cannot be viewed as ones made by a reasonably prudent person. Although Neman emphasizes the fact that Metson’s mother fell on the first day of trial, that fact did not explain counsel’s absence. Counsel was absent because he forgot he had agreed to represent Neman and did not calendar the trial. Otherwise he would have notified the court of his mother’s accident.

3. Neman’s Challenge to Evidence and Damages

Neman has many other arguments concerning the trial, which occurred in his absence. For example he argues damages should have been limited to the amounts he incurred, not the amounts billed; the trial court improperly relied on hearsay evidence to show causation; the court should have considered Neman’s motion in limine; and the court did not require a statement of damages. None of these arguments were raised at trial, and Neman therefore has forfeited them. (*Environmental Law Foundation v. Beech-Nut Nutrition Corp.* (2015) 235 Cal.App.4th 307, 325.) Because Neman did not raise those arguments at trial, the court did not have the opportunity to correct the alleged errors. (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799-800.) While there is an exception to the forfeiture rule if an issue presents a pure

question of law on undisputed facts, Neman fails to show the facts in this case were undisputed. (See *id*. at p. 800.)

Moreover, the record on appeal is inadequate to evaluate Neman's arguments. We cannot determine Okhovat's testimony regarding the amount of damages as no reporter's transcript of trial was presented. We cannot evaluate the amount of the medical bills as those are not included in our record. Neman states that Okhovat "testified as to the **total** amount that was billed (not what was actually paid)," but his citation to the record does not support his statement and it is not supported by any other evidence in the record. Because there is no transcript of the proceedings we cannot determine the sufficiency of the evidence to support causation. Additionally, Neman cites no record support for his assertion that Okhovat failed to provide a statement of damages. Nor does the record support the statement that the damages were beyond common experience such that expert testimony was necessary as a matter of law.

Neman also argues that "the trial judge exceeded his powers when he forbad[e] appellant from filing any motion/petition that attacks his orders and judgment." (Capitalization, boldface and underscoring omitted.) The court considered all of Neman's motions on the merits and denied his motion to set aside the judgment on the merits. Although the court did not consider new arguments raised in Neman's reply to his opposition to a motion for new trial, Neman does not demonstrate that the court was required to consider issues raised for the first time in a reply. Neman fails to show any error with respect to the trial proceedings or the courts consideration of his posttrial motions.

4. Cross-complaint

Finally, Neman argues the court erred in dismissing his cross-complaint with prejudice. He argues that under section 581, subdivision (b) the cross-complaint should have been dismissed without prejudice. The statute supports his argument as it provides an action may be dismissed "[b]y the court, *without prejudice*, when either party fails to appear on the trial and the other party appears and asks for dismissal."

(§ 581, subd. (b)(5), italics added.) Thus, the dismissal should have been without prejudice and Okhovat does not argue otherwise.

DISPOSITION

The judgment is modified to reflect that the cross-complaint is dismissed without prejudice. As modified, the judgment is affirmed. The order denying Neman's motion to set aside the judgment is affirmed. The parties shall bear their own costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.